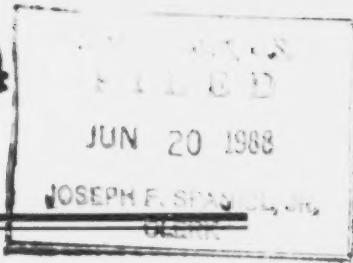


87-2074

No.



IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

A. H. ROBINS COMPANY, INCORPORATED,
Petitioner,
v.

WILMA M. MARESSA,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit erred by holding that requests for leave to file proofs of claims in a bankruptcy case after the bar date for such filings are governed by the liberal provisions of Rule 60(b) of the Federal Rules of Civil Procedure instead of the strict "excusable neglect" standard established by Bankruptcy Rules 3003 and 9006.



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A. H. ROBINS COMPANY, INCORPORATED,
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**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

A. H. Robins Company, Incorporated ("Robins"), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this matter.¹

OPINIONS BELOW

The opinion of the court of appeals (App'x A) is reported at 839 F.2d 220 (4th Cir. 1988). The opinion of the district court (App'x B) is unreported.

¹ All parties to the proceedings below are identified in the caption. Furthermore, as required by Rule 28.1 of the Rules of the United States Supreme Court, Robins states that its subsidiaries, not wholly owned, are: Lee Laboratories, Incorporated, Riddick Communications, Eurand Italia, S.p.A., Eurand International, S.r.l., Eurand Microencapsulation, S.A., Eurand de Mexico, S.A. de C.V., Phariab Industrial Company, A. H. Robins Farmaceutica, S.A., Pharco Laboratories, Ltd., and A. H. Robins-Showa Co., Ltd. Robins, as part of its pending proposed plan of reorganization, has signed a merger agreement with American Home Products Corporation.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment on February 16, 1988. App'x A at 1a. By order entered March 22, 1988, the court of appeals denied Robins' timely Petition for Rehearing And Suggestion For Rehearing In Banc. App'x C at 7a. This petition is filed within ninety days of entry of that order. *See* 28 U.S.C. § 2101(c). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This petition involves 11 U.S.C. § 501, Bankruptcy Rules 3003(c) and 9006(b), and Rule 60(b) of the Federal Rules of Civil Procedure. The text of these provisions is printed as Appendices D through G, respectively.

STATEMENT OF THE CASE

This matter arose from Robins' reorganization case (the "Chapter 11 case") pending in the United States Bankruptcy Court for the Eastern District of Virginia. The Chapter 11 case is "vastly complex and includes the unusual element of hundreds of thousands of personal injury tort claims [relating to the Dalkon Shield intrauterine contraceptive device ("the Dalkon Shield")] which are pending against" Robins. *Vancouver Women's Health Collective Society v. A. H. Robins Co.*, 820 F.2d 1359, 1360 (4th Cir. 1987).

On November of 1985, after a hearing and much discussion among the parties, the court entered an order which, among other matters, set the bar date as April 30, 1986, established the form of notice to be disseminated to trade creditors, stockholders, and potential Dalkon Shield claimants, and created a procedure by which Robins would disseminate this notice to the world.

Id.

On July 1, 1985, eight weeks before the commencement of the Chapter 11 case, respondent Wilma M. Maressa ("Maressa") filed an action against Robins in the United States District Court for the Western District of New York, seeking damages for injuries allegedly caused by her use of the Dalkon Shield. *See Maressa v. A. H. Robins Co.*, 839 F.2d 220 (1988) (App'x A at 2a).² Like all other plaintiffs in pre-petition Dalkon Shield suits, Maressa was listed on Robins' schedules of creditors as a holder of a contested and unliquidated claim, *id.*, and consequently was notified through her attorney of the filing of the voluntary petition and the need to file a proof of claim.³ App'x A at 3a. Maressa's counsel also was sent a copy of the notice of the April 30, 1986 bar date that is described in the excerpt from the *Vancouver* opinion quoted above. *Id.*

The bar date passed without a proof of claim being filed for Maressa.

Unfortunately, in the words of Maressa's attorney, "as a result of th[e] large influx of cases and the blizzard of paperwork that it involved, our obligation to file a separate Proof of Claim on behalf of Wilma Maressa . . . was overlooked, and no Proof of Claim was filed.

Id. Rather than filing a motion seeking leave to file a late claim, Maressa's counsel filed a pleading titled "Motion for Relief from Judgment or Order." This motion, affidavit of Maressa's counsel (without exhibits) and supporting memorandum appear as Appendices H, I and J, respectively.

² Henceforth, citations to the *Maressa* opinion will provide only the appendix page reference.

³ Creditors whose claims are scheduled as disputed, contingent or unliquidated must file proofs of claim. *See* 11 U.S.C. § 1111(a); Bankr. R. 3003(c)(2); *In re Vertientes, Ltd.*, 845 F.2d 57, 60 (3d Cir. 1988).

Maressa's motion asked for an "order pursuant to Local Rule 7(f) and Rule 60(b) and 55(c) of the Federal Rules of Civil Procedure . . . relieving [Maressa] from the effect of failing to file a [timely] proof of claim . . ." App'x H at 13a. In her moving papers, Maressa did not address whether she was entitled to file a late claim based on a showing of "excusable neglect" pursuant to Bankruptcy Rule 3003 and 9006(b). Instead, considering herself in a "default situation," Maressa cited several cases discussing the appropriate standards under the Federal Rules of Civil Procedure for setting aside a default judgment. App'x at 20a-22a.

In response, Robins submitted a memorandum explaining the error in Maressa's legal theory and suggesting that her motion should be treated as a request for leave to file a late proof of claim. App'x K at 23a-24a. Robins' memorandum further explained that Bankruptcy Rules 3003 and 9006(b) provided the appropriate standards for determining if Maressa was entitled to such relief. Robins' memorandum also explained why, as a matter of law, Maressa failed to satisfy the requirements of "excusable neglect." App'x K at 25a-27a.

Pursuant to a standing administrative order, Maressa's motion was heard by the district judge presiding in the Chapter 11 case. At the January 12, 1987 hearing, the district court expressly found that Maressa had failed to establish excusable neglect and that, upon the legal theory advanced in her pleadings, could not obtain the relief sought. App'x A at 2a. The district court, however, found that "justice requires that we permit the filing of the claim" and directed that Maressa be permitted to file a late proof of claim. *Id.* On January 20, 1987, the district court issued its written order stating its oral ruling at the January 12 hearing. App'x B at 4a.

Robins timely noted its appeal. Robins argued that the district court erred in permitting Maressa to file a

late proof of claim on "equitable grounds" after expressly finding that Maressa had failed to demonstrate excusable neglect. The Fourth Circuit held that the district court had abused its discretion in exercising its "general equitable powers" to permit Maressa's late filing of her claim. App'x A at 2a-3a.

In so ruling, the Fourth Circuit recognized the essential functions of a bar date in a Chapter 11 case.

[R]egardless of actual notice to the debtor, Congress has established a scheme which requires the filing of creditors' claims within a set time to promote certainty and finality. *See Hoos & Co. v. Dynamics Corp.*, 570 F.2d 433 (2d Cir. 1978). The clear Congressional intent to require filing of valid proofs of claim within the established time limit precludes any exceptions based on general equitable principals. While the effects of the bar date appear harsh, any other result would undermine the clear purpose of the Bankruptcy Rules.

App'x A at 3a. Notwithstanding its emphatic language regarding the vital function of a bar date, the Fourth Circuit ignored Bankruptcy Rule 9006(b) and the cases dealing with the issue of excusable neglect and remanded the matter to the district court for further consideration under Rule 60(b)(1) of the Federal Rules of Civil Procedure. The Fourth Circuit directed that "[t]his rule should be applied in this case to determine whether the untimely filing of a claim should be permitted." App'x A at 3a.

On March 1, 1988, Robins filed a petition for rehearing with suggestion for rehearing in banc. Robins argued that Rule 60(b)(1) was the wrong standard for determining whether the untimely filing of claims should be permitted in Chapter 11 reorganization cases. Robins requested the Fourth Circuit to revise its opinion to reflect that Bankruptcy Rule 9006(b) sets forth the correct standard to be applied to late claim determinations

in Chapter 11 reorganization cases. By order entered March 22, 1988, the Fourth Circuit denied Robins' request for a rehearing.

REASON FOR GRANTING THE PETITION

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS OVER AN IMPORTANT QUESTION OF FEDERAL LAW THAT AFFECTS THE ADMINISTRATION OF ALL BANKRUPTCY CASES.

The Fourth Circuit's decision to apply Rule 60(b)(1) of the Federal Rules of Civil Procedure to late claim determinations in Chapter 11 reorganization cases directly conflicts with the law in other circuits and presents an important question of federal law that arises in every bankruptcy case. The Fourth Circuit's decision expressly recognizes the critical purpose bar dates serve in Chapter 11 cases yet applies a standard to late claim determinations that would undermine the certainty and finality that Congress intended bar dates to accomplish. For precisely the important policy reasons recited in the Fourth Circuit's decision, Rule 60(b)(1) is the wrong standard for determining whether the untimely filing of claims should be permitted in Chapter 11 reorganization cases.

The determination of the standard by which late claims are considered presents an important issue of federal law that pervades the bankruptcy system. Each and every bankruptcy case must have a bar date and the concomitant potential for late filed claims. *See* Bankr. R. 3002(c) (Chapter 7 and Chapter 13 cases); Bankr. R. 3003(c) (Chapter 9 and Chapter 11 cases). As relevant to Chapter 11 reorganizations, “[t]he Court *shall* fix and for cause shown *may* extend the time within which proofs of claim or interest may be filed.” Bankr. R. 3003(c)(3) (emphasis added). Measured by the sheer vol-

ume of claims potentially touched by this issue,⁴ its practical importance to the administration of the bankruptcy laws is unquestionable.

Bar dates are crucial to the scheme of the bankruptcy laws. Indeed, in its decision in this case, the Fourth Circuit expressly recognized that bar dates are necessary to effect certainty and finality in bankruptcy cases. App'x A at 3a. Upon passage of the bar date in a Chapter 11 case, the parties in interest know exactly what debts and interests must be addressed in the plan of reorganization. As characterized by the Second Circuit in a case arising under the Bankruptcy Act, a bar date

insures that creditors know what they will receive under a plan within a reasonable time after they vote to confirm it. It also helps to avoid fraudulent inflation of amounts due creditors, by a debtor, for his benefit. In the instant case the amount owed to [the creditor] is beyond dispute. But there must come a time when an arrangement becomes final, so to speak. Not only are the creditors who vote for the plan entitled to this. The debtor itself must be able to function, and new creditors might not extend credit, absent such finality. It would be inequitable as to all three—old creditors, debtor, and new creditors—not to have a cut-off date beyond which even claims on a scheduled indebtedness may not be filed. Thus, however much we would like to permit the bankruptcy court to consider in a particular case, including this one, whether it would be “equitable” to permit late filing of a scheduled claim to do so would put the bankruptcy courts in the unenviable position of indefinitely having to consider claims whenever some sort of excuse is asserted.

⁴ During 1987 alone, 574,849 bankruptcy cases were commenced, representing an eight percent increase over the previous year. See Administrative Office of the Courts, Statistical Analysis and Reports Division, Federal Judicial Workload Statistics 68 (Dec. 1987). The 36,224 cases commenced in the Fourth Circuit, *id.*, are directly affected by the error of the court of appeals below.

Such a procedure would destroy the objective of finality which Congress obviously intended to promote.

Hoos & Co. v. Dynamics Corp. of America, 570 F.2d 433, 439 (2d Cir. 1978). *Accord, In re Piggott*, 684 F.2d 239, 243 (3d Cir. 1982); *In re Supernit*, 186 F.2d 130, 132-33 (3d Cir. 1950); *In re Standard Metals Corp.*, 48 B.R. 778, 788 (D. Colo. 1985); *In re Evanston Motor Co.*, 26 B.R. 998, 1003 & n.11 (N.D. Ill. 1983).

In remanding this matter to the district court for further consideration under Rule 60(b)(1), the Fourth Circuit expressed its intention to establish a "tangible standard" under which to consider requests to file late claims. *See App'x A at 3a*. The Fourth Circuit's resort to Rule 60(b)(1) for a standard to measure late claim determinations in Chapter 11 cases, however, was an unnecessary error. Congress explicitly established such a standard in Bankruptcy Rules 3003(c)(3) and 9006(b).

Because bar dates serve so critical a purpose, Congress carefully drafted the Bankruptcy Rules to ensure that mere mistake or inadvertence would not be sufficient to undermine its deliberate scheme requiring claims to be filed within certain time limits. Bankruptcy Rule 3003(c)(3) provides that "[t]he Court shall fix and *for cause shown* may extend the time within which proofs of claim or interest may be filed." Bankr. R. 3003(c)(3) (emphasis added). This rule must be read in conjunction with Bankruptcy Rule 9006(b), which allows enlargement of an already expired time period only if the failure to act within the prescribed time was a result of excusable neglect. *In re Vertientes, Ltd.*, 845 F.2d 57, 59-60 (3d Cir. 1988); *In re South Atlantic Financial Corp.*, 767 F.2d 814, 817 (11th Cir. 1985), cert. denied, 106 S. Ct. 1197 (1986); *see also In re Arrow Air, Inc.*, 75 B.R. 375, 377 (Bankr. S.D. Fla. 1987); *In re Bajan Resorts, Inc.*, 71 B.R. 52, 54 (Bankr. D. Utah 1987).

Bankruptcy Rule 9006(b) provides:

When an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of the Court, the Court *for cause shown* may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or is extended by a previous order or (2) *on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.*

Bankr. R. 9006(b) (emphasis added). Bankruptcy Rule 9006(b) mandates that a person seeking an extension of a Chapter 11 bar date after the bar date expires must show that the failure to meet the deadline for filing claims was the result of excusable neglect.⁵ See *Vertientes*, 845 F.2d at 59-60; *South Atlantic Financial Corp.*, 767 F.2d at 817; *In Re Bajan Resorts, Inc.*, 71 B.R. at 54. "The court has no discretion to grant an extension simply because no prejudice would result, or for any other equitable reason." *Vertientes*, 845 F.2d at 60 (citations omitted).

⁵ Bankruptcy Rule 9006's application to bar dates is apparent on its face. Part b of the rule contains three subsections addressing enlargement of time: (1) a general rule, (2) a special rule applicable to enumerated provisions barring any enlargement of time, and (3) a special rule permitting enlargement to the extent and under the conditions stated in certain enumerated provisions and therefore excepting such provisions from the general rule of subsection 1. Among the specifically enumerated provisions identified in Bankruptcy Rule 9006(b)(3) is the bar date rule for Chapter 7 and Chapter 13 cases: Bankruptcy Rule 3002(c). Accordingly, under Bankruptcy Rule 9006(b)(3) a bar date in a Chapter 7 or Chapter 13 case may be extended only if one of the six grounds listed in Rule 3002(c) is satisfied. *In re Whitten*, 49 B.R. 220, 221-22 (Bankr. N.D. Ala. 1985). The omission of Bankruptcy Rule 3003(c) from either of the special provisions of Rule 9006(b)(2) and (3) plainly implies that a bar date in Chapter 9 and Chapter 11 cases can only be enlarged in accordance with the general provisions of Bankruptcy Rule 9006(b)(1).

In the context of a motion to allow a party to permit the filing of a late proof of claim, a strict standard of excusable neglect applies.⁶ *In re F/S Communications Corp.*, 59 B.R. 824, 826 (Bankr. N.D. Ga. 1986). Excusable neglect under Bankruptcy Rule 9006(b) and its predecessor Rule 906(b) most frequently has been defined as "the failure to timely perform a duty . . . due to circumstances which were beyond the reasonable control of the person whose duty it was to perform." *In re Century Brass Products, Inc.*, 72 B.R. 68, 69 (Bankr. D. Conn. 1987) (quoting *South Atlantic Financial Corp.*, 767 F.2d at 817); *see also In re Gem Rail Corp.*, 12 B.R. 929, 931 (Bankr. E.D. Pa. 1981) (quoting *In re Manning*, 4 B.C.D. 304, 305 (Bankr. D. Conn. 1978)).

The two other circuit courts of appeals that have considered whether to permit the late filing of a claim in a Chapter 11 case have made that determination using the excusable neglect standard set forth in Bankruptcy Rule 9006(b). *Vertientes*, 845 F.2d at 59-60; *South Atlantic Financial Corp.*, 767 F.2d at 817 (citing *In re O.P.M. Leasing Services, Inc.*, 35 B.R. 854, 864 (Bankr. S.D.N.Y.

⁶ The excusable neglect standard is subject to differing interpretations depending upon the procedural context in which it appears. In *In re Magouirk*, 693 F.2d 948, 958 (9th Cir. 1982), the Ninth Circuit found that a liberal interpretation of excusable neglect should be applied to a motion for permission to file a late complaint objecting to the dischargeability of a debt under old Bankruptcy Rule 404. This case and others with similar holdings, however, are irrelevant to a determination of the appropriate standard of excusable neglect to be applied to motions seeking leave to file late claims. First, such decisions construe entirely different rules than those that establish claim filing procedures and provide for the setting of bar dates. Accordingly, the preeminent policies promoted by bar dates are not implicated. Moreover, the issue of what standards apply in the context of late dischargeability complaints was rendered moot by the new Bankruptcy Rules. Under Bankruptcy Rule 4007(c), a court has no discretion to extend the time to file a dischargeability complaint after the time for filing such complaints has expired. Bankr. R. 4007(c); *In re Maher*, 51 B.R. 848, 851-52 (Bankr. N.D. Iowa 1985).

1983) (Act case under Rule 9006(b)'s identically worded predecessor Rule 906(b)). The cases applying the excusable neglect standard of Bankruptcy Rule 9006(b) to late claim determinations are legion. *See, e.g., In re Arrow Air, Inc.*, 75 B.R. 375, 377 (Bankr. S.D. Fla. 1987); *In re Decko Products, Inc.*, 73 B.R. 275, 277 (Bankr. N.D. Ohio 1987); *In re Century Brass Products, Inc.*, 72 B.R. 68 (Bankr. D. Conn. 1987); *In re Bajan Resorts, Inc.*, 71 B.R. 52, 54 (Bankr. D. Utah 1987); *In re Sitzberger*, 65 B.R. 256, 257-58 (Bankr. S.D. Cal. 1986); *In re Southern Commodity Corp.*, 62 B.R. 4, 5 (Bankr. S.D. Fla. 1986); *In re Wm. B. Wilson Mfg. Co.*, 59 B.R. 535, 537 (Bankr. W.D. Tex 1986); *In re Overly-Hautz Co.*, 57 B.R. 932, 937 (Bankr. N.D. Ohio 1986); *In re McCoy Management Services, Inc.*, 44 B.R. 215, 216 (Bankr. W.D. Ky. 1984).

At least two other courts have applied a "strict" standard of excusable neglect when making late claim determinations in Chapter 11 cases. *In re Waterman S.S. Corp.*, 59 B.R. 724, 727-28 (Bankr. S.D.N.Y. 1986) ("Excusable neglect is present when a party fails to meet an obligation due to 'unique or extraordinary' circumstances . . . which are 'beyond the reasonable control' of the delinquent party."); *In re Central Equipment and Service Co., Inc.*, 61 B.R. 986, 988 (Bankr. N.D. Ga. 1986) (citing *South Atlantic Financial Corp.*, 767 F.2d 814)).

A small minority of cases applies a different standard of "cause" under Bankruptcy Rule 3003(c)(3). *In re Wellman*, 74 B.R. 91, 94 (Bankr. D. S.C. 1985); *In re Terex Corp.*, 45 B.R. 290, 292 (Bankr. N.D. Ohio 1985); *In re American Skate Corp.*, 39 B.R. 953, 954 (Bankr. D. N.H. 1984). Nonetheless, even the cases advancing the minority viewpoint do not mention Federal Rule 60 (b)(1) or in any way indicates that a standard other than that set forth in Bankruptcy Rule 3003(c)(3) or Bankruptcy Rule 9006(b)(1) should govern late claim

determinations in Chapter 11 cases. In fact, Robins knows of no reported case in which a court has found that Rule 60(b)(1) governs the late filing of proofs of claim in a Chapter 11 reorganization.⁷ Given the clear intent of Congress to promote finality, the total absence of any authority supporting a standard that permits mere mistake or inadvertence to circumvent bar dates only makes sense.

Most importantly, application of Rule 60(b)(1) to late claim determinations in Chapter 11 cases is completely contrary to the policies of certainty and finality that Congress intended to promote in establishing bar dates. The Congressional objective of finality would be jeopardized if the standard for submitting late proofs of claim was set so low as to permit liberal exception to the deadline. This is precisely what the Fourth Circuit's error invites.

Rule 60(b)(1) permits a court to relieve a party from a final order upon a showing of "mistake, inadvertence, surprise, or excusable neglect . . ." Although this Court has not announced a standard for Rule 60(b) motions, the courts of appeals unanimously agree that Rule 60(b) must be construed liberally, with all doubts resolved in favor of permitting the requested relief. See, e.g., *Green-spin v. Hogan*, 492 F.2d 375, 382 (1st Cir. 1974); *Matarese v. LeFevre*, 801 F.2d 98, 106 (2d Cir. 1986); *Medunic v. Ledur*, 533 F.2d 891, 894 (3d Cir. 1976);

⁷ Rule 60 does apply in bankruptcy cases by operation of Bankruptcy Rule 9024. Its application, however, is restricted to efforts to obtain relief from default judgments and other orders of the bankruptcy court. See, e.g., *In re Independent Clearing House*, 77 B.R. 843, 883-84 (D. Utah 1987). The bar date order, unlike the orders contemplated by Rule 60(b), is not a judicial pronouncement on the merits of a claim. Instead, it operates as a "statute of limitations" applicable to all potential claims. *In re Hatchett*, 31 B.R. 833, 834 (Bankr. E.D. Va. 1983). Given its unique purpose, Congress specifically established Bankruptcy Rules 3003 and 9006 to control requests for relief from the bar date order.

Tolson v. Hodge, 411 F.2d 123, 130 (4th Cir. 1969); *Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 895 (5th Cir. 1984); *In re Salem Mortgage Co.*, 791 F.2d 456, 459-60 (6th Cir. 1986); *Andrews v. Heinold Commodities, Inc.*, 771 F.2d 184, 188 (7th Cir. 1985); *Knox v. Lichtenstein*, 654 F.2d 19, 22 (8th Cir. 1982); *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984); *Greenwood Explorations, Ltd. v. Merit Gas & Oil Co.*, 837 F.2d 423, 426 (10th Cir. 1988); *Scutieri v. Paige*, 808 F.2d 785, 794 (11th Cir. 1987); *Jackson v. Beech*, 636 F.2d 831, 836 (D.C. Cir. 1980). By its express language, Rule 60(b)(1) could permit a creditor to circumvent a bar date and destroy its purpose by simply showing an inadvertent mistake.

Indeed, the cases discussing Rule 60(b)(1) reveal that, far from constituting a "tangible standard" that preserves the integrity of bar dates and the Bankruptcy Rules, Rule 60(b)(1) establishes no real standard at all. Relief under Rule 60(b)(1) is left to the sound discretion of the trial court and will not be disturbed on appeal absent a showing of abuse. *E.g., Square Construction Co. v. Washington Metropolitan Area Transit Authority*, 657 F.2d 68, 71 (4th Cir. 1981). As the Fourth Circuit has recognized, Rule 60(b) is "broadly phrased . . . freeing Courts to do justice in hard cases where the circumstances generally measure up to one or more of the itemized grounds." *Compton v. Alton Steamship Co.*, 608 F.2d 96, 102 (4th Cir. 1979). Moreover, in stark contrast to the Fourth Circuit's holding that the district court abused its discretion by exercising its general equitable powers to permit the filing of a late claim, a court may take equitable principles into account when exercising its discretion under Rule 60(b). See 11 C. Wright & A. Miller, *Federal Practice & Procedure*, § 2857 at 158 (1973).

In short, the purpose of Rule 60(b)(1) simply is antithetical to the concept of bar dates. Rule 60(b)(1)

is designed to open doors; under Rule 60(b)(1) considerations of the need to establish finality "should never be used to thwart the objectives of the blind goddess' of justice itself." *Compton v. Alton Steamship Co.*, 608 F.2d at 103 (citing *Bougher v. Secretary*, 572 F.2d 976, 978-79 (3d Cir. 1978)). The paramount goal of bar dates and the Bankruptcy Rules is to promote certainty and finality. The application of Rule 60(b)(1) to motions seeking extensions of bar dates to file late claims therefore would undermine the Congressional objective in establishing bar dates.

CONCLUSION

The Fourth Circuit's decision to apply Rule 60(b)(1) to late claim determinations in Chapter 11 reorganization cases ignores the relevant Bankruptcy Rules and directly conflicts with the law of the other circuits. Moreover, the decision below immediately affects the administration of every bankruptcy case filed in the Fourth Circuit. For all the foregoing reasons, this Court should grant this petition and the requested writ of certiorari.

Respectfully submitted,

WILLIAM R. COGAR

Counsel of Record

JAMES C. ROBERTS

CLIFFORD W. PERRIN, JR.

JAMES S. CROCKETT, JR.

LINDA J. THOMASON

MAYS & VALENTINE

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Counsel for A. H. Robins

Company, Incorporated

APPENDICES



APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 87-1041

WILMA M. MARESSA,
Plaintiff-Appellee,

versus

A. H. ROBINS COMPANY, INCORPORATED; OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS; DALKON SHIELD CLAIMANTS' COMMITTEE; LEGAL REPRESENTATIVE OF THE FUTURE TORT CLAIMANTS,
Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond
Robert R. Merhige, Jr., Senior District Judge—
(CA-85-1307-R)

Argued: December 2, 1987 Decided: February 16, 1988

Before RUSSELL, WIDENER, and CHAPMAN, Circuit Judges.

Linda Jenkins Thomason (William R. Cogar; Clifford W. Perrin, Jr.; James S. Crockett, Jr.; Mays & Valen-

tine; Michael L. Cook; Dennis J. Drebsky; Skadden, Arps, Slate, Meagher & Flom on brief) for Appellant; James B. Tuttle (Harvey and Harvey, Mumford & Kingsley; Matthew N. Ott on brief) for Appellee.

PER CURIAM:

A. H. Robins Company, Inc. appeals the order of the district court granting Wilma M. Maressa leave to file a proof of claim subsequent to the bar date of April 30, 1986 set by the court. At the hearing on Maressa's motion for relief from the bar date pursuant to Local Rule 7(f) and Rules 60(b) and 55(c) of the Federal Rules of Civil Procedure, the court found that excusable neglect was not established. Nevertheless, the court held that

justice requires that we permit the filing of the claim. Robins had notice of it. There was a lawsuit pending. I don't think it sets any precedent except as to lawsuits that were pending, and they were on notice. I would simply direct instead of calling it an amended one, go ahead and present an order permitting the filing of the claim

Because we believe the district court abused its discretion in exercising its general equitable powers, we remand this case to the district court for further consideration under Fed. R. Civ. P. 60(b).

I

Maressa filed an action against Robins on July 1, 1985 in the United States District Court for the Western District of New York seeking damages for injuries caused by her use of a Dalkon Shield. The action was stayed when Robins filed its bankruptcy petition on August 21, 1985. Thereafter, Maressa's claim was listed in Robins' bankruptcy schedule as an unliquidated, contingent and disputed claim. Pursuant to Bankruptcy Rule 3003 (c)(3), the district court established April 30, 1986 as

the bar date for the filing of claims against Robins. Maressa received notification of the bar date through her attorney. Her attorney also served as counsel to a number of other Dalkon Shield claimants and ultimately filed approximately thirty separate claims prior to the bar date. Unfortunately, in the words of Maressa's attorney, "as a result of th[e] large influx of cases and the blizzard of paperwork that it involved, our obligation to file a separate Proof of Claim on behalf of Wilma Maressa . . . was overlooked, and no Proof of Claim was filed."

II

Bankruptcy Rule 3003(c)(2) expressly requires creditors with a claim scheduled by the debtor as "disputed, contingent or unliquidated" to file a proof of claim. Therefore, regardless of actual notice to the debtor, Congress has established a scheme which requires the filing of creditors' claims within a set time limit to promote certainty and finality. *See Hoos & Co. v. Dynamics Corp.*, 570 F.2d 433 (2d Cir. 1978). The clear Congressional intent to require filing of valid proofs of claims within the established time limits precludes any exceptions based on general equitable principles. While the effects of the bar date appear harsh, any other result would undermine the clear purpose of the Bankruptcy Rules.

Rule 60(b)(1) of the Federal Rules of Civil Procedure, however, provides relief from a final order of the court upon a showing of "mistake, inadvertence, surprise, or excusable neglect. . . ." This rule sets forth a tangible standard which should be applied in this case to determine whether the untimely filing of a claim should be permitted.

Therefore, we remand this case to the district court for further consideration and disposition consistent with this opinion under Federal Rule 60(b).

REMANDED.

APPENDIX B

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Chapter 11

No. 85-01307-R

RETAINED PROCEEDINGS
(Judge Merhige)

IN RE A. H. ROBINS COMPANY, INCORPORATED,
Debtor.

EMPLOYER'S TAX IDENTIFICATION NUMBER 54-0486348

ORDER

On motion of Wilma M. Maressa, by counsel, that she be granted leave to file a Proof Of Claim, upon consideration of the memoranda and argument of counsel and for reasons stated in open court on January 12, 1987,

It is ORDERED that Wilma M. Maressa is granted leave to file her Proof Of Claim in this proceeding.

January 20, 1987

/s/ Robert R. Merhige, Jr.
ROBERT R. MERHIGE, JR.
United States District Judge

I Ask For This:

/s/ Matthew N. Ott
MATTHEW N. OTT

Seen And Objected To:

/s/ Linda J. Thomason
LINDA J. THOMASON

CERTIFICATE OF SERVICE

I do hereby certify that a true copy of the foregoing proposed Order was mailed to

Murray Drabkin, Esquire
Cadwalader, Wickersham & Taft
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

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Bremner, Baber & Janus
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Richmond, Virginia 23207

Peter A. Ivanick, Esquire
LeBoeuf, Lamb, Leiby & MacRae
520 Madison Avenue
New York, New York 10022

on this 14th day of January, 1987.

/s/ Linda J. Thomason

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 87-1041

WILMA M. MARESSA,
Plaintiff-Appellee,
v.

A. H. ROBINS COMPANY, INC., *et al*,
Defendants-Appellants.

On Petition for Rehearing with Suggestion for
Rehearing In Banc

[Filed Mar. 22, 1988]

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Chapman, with the concurrence of Judge Russell and Judge Widener.

For the Court

/s/ John M. Greacen
Clerk

APPENDIX D

11 U.S.C. § 501. Filing of proofs of claims or interests.

(a) A creditor or an indenture trustee may file a proof of claim. An equity security holder may file a proof of interest.

(b) If a creditor does not timely file a proof of such creditor's claim, an entity that is liable to such creditor with the debtor, or that has secured such creditor, may file a proof of such claim.

(c) If a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim.

(d) A claim of a kind specified in section 502(e)(2), 502(f), 502(g), 502(h) or 502(i) of this title may be filed under subsection (a), (b), or (c) of this section the same as if such claim were a claim against the debtor and had arisen before the date of the filing of the petition.

APPENDIX E

Bankruptcy Rule 3003(c)

FILING PROOF OF CLAIM OR EQUITY SECURITY
INTEREST IN CHAPTER 9 MUNICIPALITY
OR CHAPTER 11 REORGANIZATION CASES(c) *Filing Proof of Claim.*

(1) *Who May File.* Any creditor or indenture trustee may file a proof of claim within the time prescribed by subdivision (c) (3) of this rule.

(2) *Who Must File.* Any creditor or equity security holder whose claim or interest is not scheduled or scheduled as disputed, contingent, or unliquidated shall file a proof of claim or interest within the time prescribed by subdivision (c) (3) of this rule; and creditor who fails to do so shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution.

(3) *Time for Filing.* The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed.

(4) *Effect of Filing Claim.* A proof of claim or interest executed and filed in accordance with this subdivision shall supersede any scheduling of that claim or interest pursuant to § 521(1) of the Code.

(5) *Filing by Indenture Trustee.* An indenture trustee may file a claim on behalf of all known or unknown holders of securities issued pursuant to the trust instrument under which it is trustee.

APPENDIX F**Bankruptcy Rule 9006(b)****TIME****(b) *Enlargement.***

(1) *In General.* Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

(2) *Enlargement Not Permitted.* The court may not enlarge the time for taking action under Rule 1007(d), 1017(b)(3), 1019(2), 2003(a) and (d), 7052, 9015(f), 9023, and 9024.

(3) *Enlargement Limited.* The court may enlarge the time for taking action under Rules 1006(b)(2), 3002(c), 4003(b), 4004(a), 4007(c), 8002, and 9033, only to the extent and under the conditions stated in those rules.

APPENDIX G**Rule 60(b), Federal Rules of Civil Procedure**

(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of *coram nobis*, *coram vobis*, *audita querela*, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

APPENDIX H

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA**

Chapter 11

Case. No. 85-01307-R

RETAINED PROCEEDING

(Judge Merhige)

LDS 004805

IN RE: A. H. ROBINS COMPANY, INCORPORATED,
Debtor

WILMA M. MARESSA

—against—

A. H. ROBINS COMPANY, INCORPORATED

[Filed Oct. 23, 1986]

**MOTION FOR RELIEF FROM JUDGMENT
OR ORDER**

Upon the annexed Affidavit of James B. Tuttle sworn to the 7th day of October, 1986, and the exhibits thereto, and the accompanying Memorandum of Points and Authorities, the plaintiff Wilma M. Maressa moves this

Court for an order pursuant to Local Rule 7(f) and Rules 60(b) and 55(c) of the Federal Rules of Civil Procedure for an order relieving her from the effect of having failed to file a Proof of Claim form prior to the April 30, 1986 deadline and directing the Clerk of the Court to accept the plaintiff's Proof of Claim and Questionnaire for filing in this proceeding.

Dated: October 9, 1986
Albany, New York

Yours, Etc.

HARVEY AND HARVEY,
MUMFORD & KINGSLEY

By: /s/ James B. Tuttle
JAMES B. TUTTLE, Esq.
Attorneys for
Wilma M. Maressa
Office and Post Office Address
29 Elk Street
Albany, New York 12207
Tel: (518) 463-4491

/s/ Matthew N. Ott
MATTHEW N. OTT, Esq., P.C.
106 East Cary Street
Richmond, VA 23219
Local counsel to Harvey and
Harvey, Mumford & Kingsley

APPENDIX I

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA

Chapter 11

Case. No. 85-01307-R

RETAINED PROCEEDING

(Judge Merhige)

LDS 004805

IN RE: A. H. ROBINS COMPANY, INCORPORATED,
Debtor

WILMA M. MARESSA

—against—

A. H. ROBINS COMPANY, INCORPORATED

AFFIDAVIT OF JAMES B. TUTTLE

STATE OF NEW YORK) —
) ss:
COUNTY OF ALBANY)

JAMES B. TUTTLE, being duly sworn, deposes and says:

1. I am a principal in the firm of Harvey and Harvey, Mumford & Kingsley, and have been responsible for the

preparation and prosecution of this case from the outset and I am fully familiar with all of the facts and circumstances recited herein. I make this affidavit in support of Wilma M. Maressa's application for an order relieving her from the effect of having failed to file a proof of claim form prior to the April 30, 1986, deadline.

2. This firm was retained by Wilma M. Maressa in June, 1985, to represent her in an action against A.H. Robins, Inc. to recover for serious physical injuries and infertility resulting from her use of the Dalkon Shield intrauterine device. On July 1, 1985, a complaint was filed in the United States District Court for the Western District of New York on behalf of Wilma Maressa against A. H. Robins Company, Inc., a copy of which is annexed hereto as Exhibit "A". This action was assigned to Judge Telesca and given Civil Action File No. 85-0833. After filing, the complaint was served on A. H. Robins, as demonstrated by the Affidavits of service annexed hereto as Exhibit "B". Robins interposed its answer in the action dated August 5, 1985, which was served with interrogatories to the plaintiff and a request for production of certain documents. Robins' answer and discovery demands are annexed hereto as Exhibit "C". On August 26, 1985, Robins' defense counsel served on the Court and counsel a copy of the voluntary petition of Robins in Chapter 11, copies of which documents are annexed hereto as Exhibit "D". Service of these papers automatically stayed all proceedings in the action in the United States District Court for the Western District of New York.

3. As the April 30 deadline for filing proofs of claim approached, our office received numerous requests to serve as counsel to Dalkon Shield claimants from other lawyers, from parties calling us directly after seeing television or newspaper advertisements pertaining to the bar date published by Robins at the direction of this Court and from other sources. The vast majority of

these were cases in which no prior action had been commenced and as to which no filings or communications with the Bankruptcy Court had been had in any way. As a result, approximately 30 separate claims were filed by my office in this proceeding prior to the April 30, 1986 deadline. Also as a result of this large influx of cases and the blizzard of paperwork that it involved, our obligation to file a separate Proof of Claim on behalf of Wilma Maressa in addition to the Summons and Complaint previously filed with the District Court was overlooked, and no Proof of Claim was filed.

4. As the June 30 deadline for the filing of the questionnaire and claim forms approached, my staff prepared and I reviewed and signed questionnaire and claim forms for all Dalkon Shield claimants represented by this office. It being assumed that there was no problem with the Maressa claim, my staff prepared and I signed and filed the questionnaire and claim form a copy of which is annexed hereto as Exhibit "E" on behalf of Wilma Maressa. I did not realize that there was any problem with the Maressa filing until I received on August 25, 1986, a notice from the office of the Clerk of the Bankruptcy Court addressed to Wilma M. Maressa, c/o of James B. Tuttle under LDS No. 004805 a notice indicating that no Proof of Claim had been filed prior to April 30, 1986 as to Wilma Maressa. The purpose of this motion is to obtain relief from this notice, which is in effect an order or a judgment to which Rule 60 of the Federal Rules of Civil Procedure would apply and also a default to which Rule 55(b) of the Federal Rules of Civil Procedure would apply.

5. I respectfully submit that the failure to file a Proof of Claim in this matter is purely a technical defect of form only and no substance and that there will be absolutely no prejudice to Robins in permitting the late filing of the Proof of Claim in this case. Since this action was put in suit prior to Robins filing of its bankruptcy, Robins

had even before the bankruptcy was filed vastly more information as to Wilma Maressa's claim against it than it now has as to those claims in which the only filing to date is a proof of claim and a questionnaire and claim form, both of which contain only minimal information. Clearly this claim against Robins was a pending claim prior to the filing of the bankruptcy and prior to the April 30, 1986 filing date of which the debtor was fully aware. Therefore, permitting the filing of this Proof of Claim will not have an adverse effect on the purpose of the bar date (i.e., the fixation of a total number of claims) since this claim was known to Robins prior to the bar date.

6. It is also respectfully submitted that the medical records pertaining to Wilma Maressa attached hereto as Exhibit "F" demonstrate that she has a meritorious claim against Robins. These records show that she had a Dalkon Shield; that she developed pelvic inflammatory disease during her use of the device which required her hospitalization and the surgical removal of the IUD; and that two years later she underwent exploratory surgery to determine the cause of involuntary infertility which resulted in a final diagnosis of bilateral tubal occlusions and adhesions from previous pelvic inflammatory disease.

7. The failure to file this Proof of Claim resulted from mistake, inadvertence and excusable neglect on the part of myself and my staff and was occasioned by the blizzard of paperwork which resulted from the imposition of the April 30 filing date itself. The majority of the claimants which this office now represents in this proceeding first contacted this office during the last three weeks of April, 1986, and the failure to attend to the proper filing in this case clearly resulted from the confusion of evaluating and filing all of the other claims with which we were approached during this period.

8. Finally, permitting the late filing of the proof of claim as requested by this motion would not disturb the

finality of any judgment and would be in accordance with prior decisions of this Court, as is more fully set forth in the Memorandum of Points and Authorities.

9. For all of the foregoing reasons, I respectfully submit that it is appropriate for the Court to excuse the plaintiff's failure to file her Proof of Claim in the bankruptcy prior to April 30, 1986, and to direct the Clerk of the Court to accept for filing her Proof of Claim in the form attached hereto as Exhibit "G" and her questionnaire and claim form.

/s/ James B. Tuttle
JAMES B. TUTTLE

Sworn to before me this 7th day of October, 1986

/s/ Theresa J. Dodson
Notary Public—State of New York
My Commission Expires: 3/30/87

APPENDIX J

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA

Chapter 11

Case No. 85-01307-R

RETAINED PROCEEDING

(Judge Merhige)

LDS 004805

IN RE: A. H. ROBINS COMPANY, INCORPORATED,
Debtor

WILMA M. MARESSA

-against-

A. H. ROBINS COMPANY, INCORPORATED

[Filed Oct. 23, 1986]

MEMORANDUM OF POINTS AND AUTHORITIES

Having failed to file a proof of claim in this bankruptcy prior to the April 30, 1986, bar date, the plaintiff Wilma Maressa is, for all practical purposes, in a default situation. The plaintiff now moves pursuant to Rules 60 (b) and 55 (c) of the Federal Rules of Civil Procedure and Local Rule F of the Court for an order relieving her

from the effect of having failed to so file prior to the April 30, 1986 deadline and directing the Clerk of the Court to accept the plaintiff's proof of claim and questionnaire for filing in this proceeding.

Section 50 (c) of the FRCP provides as follows:

“(c) Setting aside default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60 (b).”

Rule 60 (b) provides in pertinent part as follows:

“On motion and upon such terms as are just the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) Mistake, inadvertence, surprise or excusable neglect . . . or (6) any other reason justifying relief from the operation of the judgment.”

The decision whether or not to set aside the entry of a default pursuant to Rule 55 (c) and pursuant to Rule 60 (b) rests in the sound discretion of the Court. *Moran v. Mitchell*, 354 F.Supp. 86 (U.S.D.C., E.D.Va, Richmond Division, 1973). It has been observed that in determining motions such as the instant one, the Court must balance the competing judicial interests of finality and repose against the basing of judgments upon all the facts; that there appears to be a clear preference to set judgments aside whenever resolution of the motion is uncertain; and that the policy behind the rules of procedure is the encouragement of disposition of claims on their merits. *Lloyd v. Carnation Company*, 101 F.R.D. 346 (U.S.D.C., Middle District of North Carolina, Durham Division, 1984) and cases cited therein; *Moran v. Mitchell, supra*.

It was recently observed by Judge Warriner of the United States District Court for the Eastern District of Virginia, Richmond Division, in *Jones v. City of Richmond*, 106 FRD 485 (June 21, 1985) that “To bring

himself within Rule 60 (b), the movant must make a showing of timeliness, a meritorious defense, a lack of unfair prejudice to the opposing party, and exceptional circumstances Once the movant has made such a showing he must proceed to satisfy one or more of the rule's six grounds for relief from judgment . . . (citations omitted)." The plaintiff's motion is clearly timely, having been brought within a matter of weeks of the date on which the plaintiff's counsel first learned that the Court would not accept for filing the plaintiff's questionnaire. The claim of Wilma Maressa is clearly meritorious as the medical records annexed to the affidavit of plaintiff's counsel, James B. Tuttle, in support of this motion demonstrate. There is no unfair prejudice to the opposing party, A. H. Robins, since prior to the bankruptcy filing Wilma Maressa had commenced an action in the U. S. District Court for the Western District of New York against them seeking the same relief. Thus, this situation is completely unlike the situation in *In the matter of Perry*, 336 F.Supp. 828 (U.S.D.C., Western District of Virginia, Roanoke Division), in which the court declined to grant relief from the failure to appear at a bankruptcy hearing on the grounds, among others, that to grant the relief requested would impose on the adverse party the inconvenience and expense of a rehearing. Here there is clearly no such prejudice to A. H. Robins, whereas there would be substantial prejudice to the plaintiff were her claim in the bankruptcy dismissed for this mere filing oversight.

Finally, this situation clearly involves exceptional circumstances. As the moving affidavit demonstrates, the existence of the April 30, 1986 bar date, combined with the publications and advertisements of such bar date required of Robins by the Court resulted in a flurry of activity in the plaintiff's counsel's office as last minute arrangements were made by referring attorneys and other clients to engage the assistance of plaintiff's counsel in asserting a claim in the bankruptcy. Thus, this case is distinct from the ordinary case of a law office failure

in the ordinary course of business. It is respectfully submitted that the circumstances which brought about the plaintiff's present default position were the result of mistake, inadvertence, surprise or excusable neglect within the meaning of Rule 60 (b) (1) and that they constitute good cause within the meaning of Rule 55 (c).

Other precedents supporting the plaintiff's position on this motion include *Trueblood v. Grayson Shops of Tennessee, Inc.*, 32 FRD 190 (U.S.D.C., E.D. Va., 1963) and *Square Construction Company v. Washington Metropolitan Area Transit Authority*, 657 F.2d 68 (4th Cir., 1981). For all of the foregoing reasons, it is respectfully submitted that it is appropriate for the Court to excuse the plaintiff's failure to file her proof of claim in the bankruptcy prior to April 30, 1986, and to direct the Clerk of the Court to accept for filing her proof of claim in the form submitted.

Dated: October 9, 1986
Albany, New York

Yours, Etc.

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APPENDIX K

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division**

**Chapter 11
No. 85-01307-R
RETAINED PROCEEDING
(Judge Merhige)**

**IN RE A. H. ROBINS COMPANY, INCORPORATED
*Debtor.***

**EMPLOYER'S TAX IDENTIFICATION
No. 54-0486348**

[Filed Nov. 3, 1986]

**RESPONSE OF A.H. ROBINS COMPANY,
INCORPORATED
TO MOTION OF WILMA M. MARESSA
FOR AN ORDER GRANTING LEAVE TO FILE
A PROOF OF CLAIM**

A. H. Robins Company, Incorporated ("Robins") submits this memorandum in response to the Motion of Wilma M. Maressa ("Movant") for an order granting her leave to file a proof of claim.* For the following reasons, the motion should be denied.

* Movant asks for an order pursuant to Local Rule 7(f) and Rules 60(b) and 55(c) of the Federal Rules of Civil Procedure

BACKGROUND

On July 1, 1985, Movant filed a tort action against Robins to recover damages for injuries allegedly caused by her use of the Dalkon Shield. On August 5, 1985, Robins answered Movant's complaint and made discovery demands on Movant. On August 21, 1985, Robins filed a petition for reorganization relief under Chapter 11 of the United States Bankruptcy Code, thereby automatically staying further proceedings in Movant's tort action against Robins.

On November 21, 1985, this Court entered an order establishing April 30, 1986 as the deadline for filing proofs of claims against Robins (the "Bar Date"). To ensure that all persons and entities received notice of the Bar Date, Robins spent four million dollars on a worldwide Bar Date Notification Program, the details of which are well documented in the record. *See Declaration of John D. Taylor Regarding Compliance with Order for Bar Date Notification Program* (filed February 7, 1986); *Declaration of John D. Taylor Regarding Expenses Incurred in Connection with Bar Date Notification Program* (filed April 1, 1986).

Approximately 327,000 Dalkon Shield claimants filed proof of claim on or before the Bar Date. Movant's attorney, James B. Tuttle ("Tuttle") filed approximately 30 claims on behalf of Dalkon Shield claimant prior to the Bar Date. Tuttle, however, failed to file a proof of claim on behalf of Movant. *See Affidavit of James B. Tuttle ("Tuttle Affidavit")*, Paragraph 3. A questionnaire was filed on behalf of Movant prior to June 30, 1986. On August 25, 1986, upon receiving a notice from

relieving her from the effect of failing to file a timely proof of claim. No final judgment or order, however, has been entered against Movant. Movant's motion, therefore, should be treated as a motion for an order granting her leave to file a proof of claim.

the Clerk of the Bankruptcy Court, Tuttle discovered no proof of claim had been filed on behalf of Movant.

ARGUMENT

This Court has the authority to extend the time for filing a proof of claim for "cause shown". Bankruptcy Rule 3003(c)(3). Bankruptcy Rule 3003(c)(3), however, must be read in conjunction with Bankruptcy Rule 9006(b). *See In re O.P.M. Leasing Services, Inc.*, 35 B.R. 854, 864 (Bankr. S.D. N.Y. 1983). Bankruptcy Rule 9006(b) provides that the court "for cause shown may . . . on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of *excusable neglect*." (Emphasis added).

Courts have interpreted "excusable neglect" to mean that the "failure to timely perform a duty was due to circumstances which were beyond the reasonable control of the person whose duty it was to perform." *In re Gem Rail Corp.*, 12 B.R. 929, 931 (Bankr. E.D. Pa. 1981) (quoting *In re Manning*, 4 B.C.D. 304, 305 (D. Conn. 1978)). Movant cannot meet this burden. For example, in *In re Underground Utility Construction Co.*, 35 B.R. 588 (Bankr. S.D. Fla. 1983), the court held that a creditor failed to demonstrate "excusable neglect" for filing his claim three days after the bar date when the untimely filing was caused by the creditor mailing his claim to the wrong address. Moreover, a "misunderstanding" between a creditor and its lawyer that causes the late filing of a proof of claim does not amount to "excusable neglect." *In re Horn Construction & Maintenance Inc.*, 32 B.R. 87 (Bankr. S.D. Ala. 1983).

Movant has not shown that her failure to file a timely proof of claim was due to circumstances beyond her control. Notwithstanding Movant's counsel's claim to the contrary, the circumstances surrounding Movant's failure to file a timely proof of claim are not exceptional and

do not constitute excusable neglect. Movant's counsel was aware of the claim, the Bar Date and the required procedures. Tuttle Affidavit, paragraph 3. Those procedures could not have been made simpler: mail a post-card with the claimant's name, address, and a statement of intent to assert a claim against Robins in time for it to be received by the Bankruptcy Court by April 30, 1986. By requesting leave to file a late proof of claim, Movant essentially is asking this Court to place upon Robins the burden of all counsel error. While sympathetic with Movant and others in her position, Robins strongly resists the imposition of this burden.

Although he successfully filed timely proofs of claim for all of his other clients, Movant's counsel neglected to file a claim on Movant's behalf because he was confronted with a "blizzard of paperwork" prior to the Bar Date. *Id.* at Paragraph 7. Robins, this Court, and the Bankruptcy Court Clerk's Office appreciate well the confusion and problems associated with a "blizzard of paperwork." Robins has willingly accepted the burden of correcting certain problems associated with the massive Bar Date Notification Program and the subsequent influx of claims.* Robins, however, does not and should not accept the burden of such obvious, inexcusable counsel error.

Movant argues that she should be allowed to file a late proof of claim because her failure to file a proof of claim was "purely a technical defect of form only and no substance" and that the filing of a late proof of claim will not prejudice Robins. The Eleventh Circuit confronted and rejected this argument in *In re South At-*

* See Order Applying November 21, 1985 Order Fixing Bar Date (entered August 26, 1986) (permitting claims postmarked on or before April 30, 1986 to be accepted as timely); Consent Order [Regarding Claims from the Republic of China] (entered August 6, 1986) (permitting claimants from Taiwan to submit late questionnaires because of postal problems).

lantic Financial Corp., 767 F.2d 814 (11th Cir. 1985), cert. denied, ____ U.S. ____ (1986). In *South Atlantic Financial Corp.*, a creditor argued that the bankruptcy court abused its discretion in failing to find "excusable neglect," and in not allowing it to file a late proof of claim where the creditor's failure to file a timely proof of claim was the result of its counsel's failure accurately to determine whether a proof of claim already had been filed. *Id.*, 767 F.2d at 818. The creditor acknowledged that its failure to file a timely proof of claim was not the result of anything beyond its reasonable control but argued that it should have been allowed to file a late proof of claim because such a late filing would not have prejudiced any other parties in the reorganization case. *Id.*

The Eleventh Circuit rejected that argument finding that "whether a late filing by the creditor would have prejudiced the debtor, its shareholders or other creditors "was not a relevant inquiry in determining whether [the creditor] established excusable neglect." *Id.* The Eleventh Circuit observed that Bankruptcy Rule 9006(b) extends the time for doing an act where "'the failure to act was the result of excusable neglect.'" *Id.* (emphasis in original).

It is clear from this language that the focus of these rules is on the Movant's actions and the reasons for those actions not on the effect that an extension might have on other parties' positions.

Id. 767 F.2d at 819.

The circumstances involved in the instant matter highlight the soundness of the Eleventh Circuit's reasoning. Movant and her counsel have not offered any reason for failing to meet the April 30 Bar Date that was not within their reasonable control. The facts demonstrate a clear case of counsel error, which falls far short of excusable neglect.

CONCLUSION

For the reasons set forth above, the motion of Wilma M. Maressa for an order granting her leave to file a proof of claim should be denied.

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CERTIFICATE OF SERVICE

I do hereby certify that a true copy of the foregoing Response of A. H. Robins Company, Incorporated to Motion of Wilma M. Maressa for an Order Granting Leave to File a Proof of Claim was mailed to

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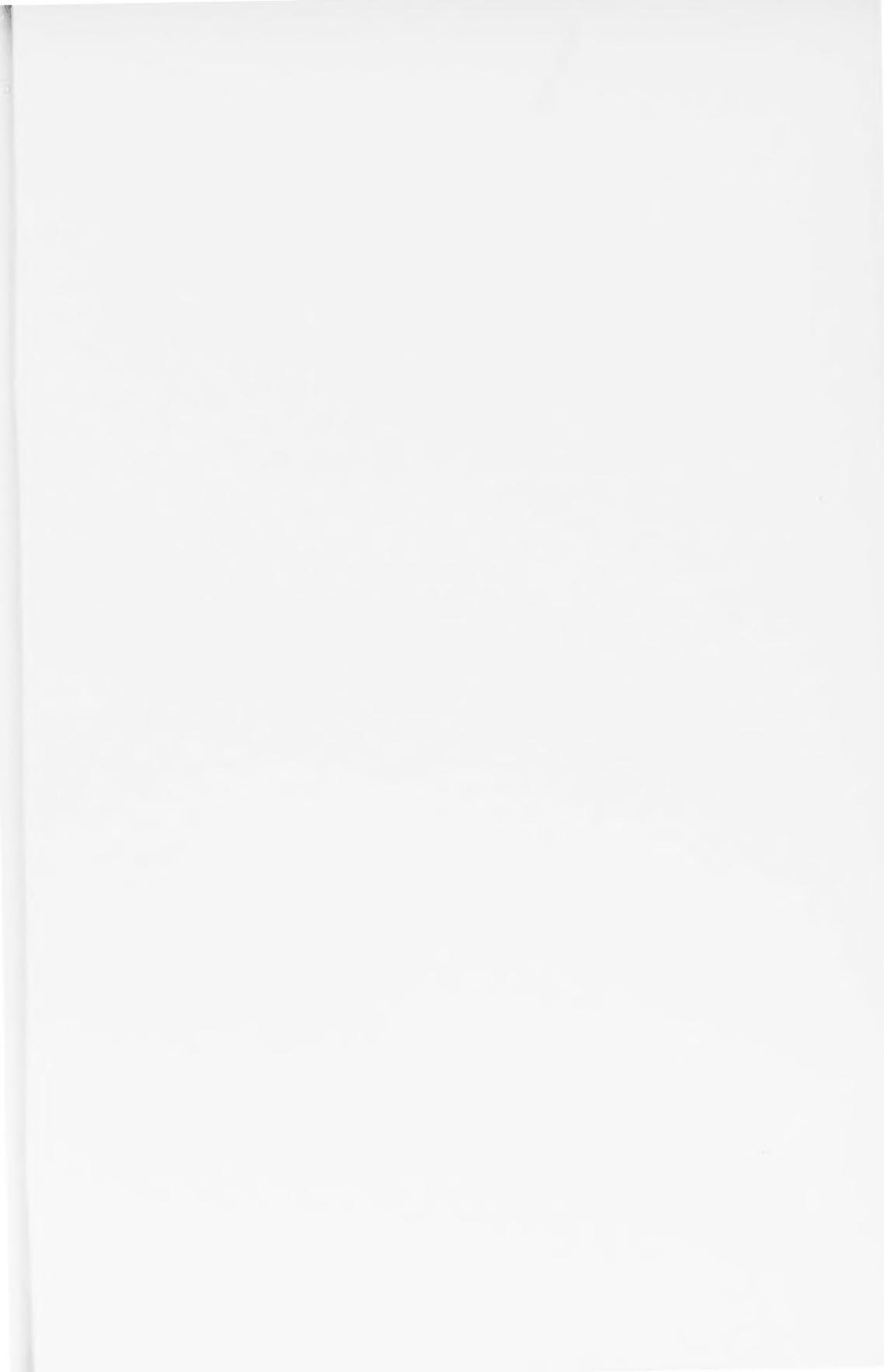
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on this 3d day of November, 1986.

/s/ Linda J. Thomason



Supreme Court, U.S.

FILED

JUL 20 1988

JOSEPH F. SPANOL, JR.
CLERK

(2)

No. 87-2074

IN THE
Supreme Court of the United States

A.H. ROBINS COMPANY, INCORPORATED,
Petitioner.

v.

WILMA M. MARESSA,
Respondent.

**BRIEF IN OPPOSITION TO THE PETITION
FOR A WRIT OF CERTIORARI**

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CERTIORARI SHOULD BE DENIED

Robins argues that certiorari should be granted and that this matter should be reviewed by the U.S. Supreme Court on the grounds that the Fourth Circuit Court of Appeals erroneously concluded that Rule 60 of the Federal Rules of Civil Procedure applies to this case and governs the decision of the Court below. Robins position is clearly without merit, for Bankruptcy Rule 9024 expressly provides that Rule 60 of the Federal Rules of Civil Procedure applies in cases under the Code. The initial motion was made and decided at the District Court level under Rule 60(b), and the Fourth Circuit Court of Appeals correctly decided that Rule 60(b) was the appropriate standard. Robins argument that Rule 60(b) does not apply to this case ignores the plain language of Rule 9024.

Bankruptcy Rule 9024 provides as follows:

Rule 9024. Relief from Judgment or Order

Rule 60 F.R.Civ.P. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(b), (2) a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by Section 727(e) of the Code, and (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by Section 1144 or Section 1330.

It is noteworthy that the statute expressly recites three exceptions to Rule 60's applicability to bankruptcy cases. Had Congress intended that Rule 60(b) should not apply to motions for leave to file claims against the estate outside of the bar date, it would have been a very simple matter for it to have added a fourth exception to Rule 9024. The Legislative Branch having failed to so provide, it would be inappropriate for the Judicial Branch to graft such provisions onto the clear language of the statute. Clearly Congress intended to subjugate the goal of the bankruptcy rules to promote certainty and finality to the broader purpose of Rule 60(b)(1) that considerations of the need to

establish finality " 'should never be used to thwart the objectives of the blind goddess' of justice itself". *Compton v Alton Steamship Co.*, 608 F 2d 103 (citing *Bougher v Secretary*, 572 F 2d 976, 978-79 (3rd Cir. 1978).

For all of these reasons, it is respectfully submitted that there is no legal question of any merit to be reviewed by the U.S. Supreme Court presented on this petition, and certiorari should therefore be denied.

Respectfully submitted,

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